Brief In Support of Petition For Writ of Certiorari

I.

Opinion of the Court Below

There was no opinion written by either of the Appellate Courts below. The judgment was unanimously affirmed by the Court of Appeals of the State of New York.

II.

Jurisdiction of This Court

A.

The statutory provision sustaining the jurisdiction is Judicial Code, Section 237b as amended by Act of February 13, 1925; 43 Stat. 937; Title 28 U.S.C.A., Section 344(b).

B.

The date of the judgment to be reviewed is November 18, 1940 on which date the County Court of Rockland County entered an order making the judgment of the Court of Appeals of the State of New York in this case its own judgment (R).

C.

The nature of the case and the ruling of the law were such as to bring the case within the jurisdictional provision of Section 237b (Supra) as appears from the following:

(a) The first contention of the petitioner is that the plea of guilty by the petitioner to the indictment was brought about by the deceit, fraud and trickery of the district attorney and petitioner's counsel, thereby rendering such plea involuntary and void, in that had such acts not been practised upon him, petitioner would not have been deprived of a trial on the merits. Hence, the conviction and imprisonment of the petitioner (which judgment and sentence was affirmed by the Court of last resort of this State), is void as having been rendered in contravention of the Fourteenth Amendment to the Constitution of the United States.

The specific statement of Federal Constitutional rights under this contention appears at page 34 and 35 of the record.

There was no opinion rendered by the Court of Appeals of the State of New York.

Petitioner's contention under the Federal Constitution were elaborately urged in the record and in the Appellate Courts and the point was maintained and preserved in the Court of Appeals of the State of New York, the Court of last resort.

The record and law set out show a direct Federal question presented and rejected, and the question is now one for this court.

(b) The second contention of the petitioner is that the effect of the acts of the district attorney was in effect a flagrant denial of petitioner's right to counsel, hence a deprivation of petitioner's right to life and liberty without due process of law under the Fourteenth Amendment to the Constitution of the United States.

Petitioner's rights under the Federal Constitution were asserted at pages 34 and 35 of the record. (Motion by petitioner to vacate and set aside the judgment of conviction, withdraw the plea of guilty and substitute and reinstate the plea of not guilty and for a new trial.) Petitioner's affidavit on this motion stated, "I most strongly urge and appeal to this Honorable Court's inherent discretion in such a case as mine to grant me an opportunity of having my day in court so that I can vindicate myself. The constitution of this State has given me, as well as every other person, the right not to be deprived of life, liberty or property without due process of law, as well as the natural right to be allowed to appear and defend in person and with counsel as a party accused.

" I do urge that a denial of the court's discretion in favor of my application would be tantamount to an absolute flagrant abuse of my constitutional rights. I have not had the opportunity of being heard either personally or through my counsel, but on the contrary, my plea of guilty during the progress of my case was involuntary and committed unknowingly and done only because of absolute fraud and trickery

practised upon me and my counsel. This can hardly be said to be within keeping of my constitutional right to liberty.

'There has been throughout, an apparent absence of "due process of law". My only remedy to correct such grave error is the one I am now seeking.'

(c) The third contention of the petitioner is that the action of the County Court in summarily disposing of petitioner's contentions as to the circumstances under which the plea of guilty was made without affording him the right to prove them in open court, was a denial of the opportunity to be heard in contravention of the Fourteenth Amendment to the Constitution of the United States.

The petitioner made application to the County Court for an order vacating and setting aside the judgment of conviction, withdrawing the plea of guilty and reinstating the plea of not guilty and for a new trial. Request was made for an opportunity to present witnesses and to have petitioner present in open court so that a full hearing as to the issues presented by the moving papers might be had. (R page 70). This request was indirectly denied by the failure of the court to direct such a hearing.

III.

Facts

A statement of the material facts has been set out in thepetition under statement A, pp1-4, and under the appropriate points in the brief.

IV.

Summary of Argument

A complete summary of the argument is printed in the index (Supra) page

Point One

The Plea of Guilty by Petitioner was an Involuntary One, having Been Brought About by the Fraud, Deceit and Trickery of Petitioner's Counsel and The District Attorney and Depriving Petitioner of A Trial On The Merits in Contravention of The Fourteenth Amendment To The Constitution of The United States.

The statute under which the motion to withdraw the plea of guilty was made is Section 337 of the Code of Criminal Procedure which provides:

"The court may in its discretion, at any time before judgment upon a plea of guilty permit it to be withdrawn, and a plea of not guilty substituted."

The Court of Appeals of the State of New York in construing this section has in general terms interpreted it to mean that after the beginning of the term of imprisonment, the Court has no power or jurisdiction to permit the plea to be withdrawn. However, in view of the decision in the case of People vs Darboch, 265 N Y 125, it has been held that:

"In other words, after judgment and the commencement of the sentence, the plea of guilty cannot be withdrawn simply because the defendant happens to have a past record of felonies. A man may be tricked or deceived into pleading guilty. When such appears, the Courts may be able to find some remedy."

Under such statute in various jurisdictions, relief has been afforded under similar circumstances where a plea of guilty was entered under a misapprehension or mistake, or where it was induced by fraud, duress, coercion or deceit.

Griffin vs State, 12 Ga App 615
Kidd vs Commonwealth, 255 Kent. 498
People vs Schwartz, 201 Cal 309
State vs Raponi, 33 Idaho 368
State exrel Foot vs District Court, 81 Mont 495
State vs Roberts, 136 Wash 359
Mounts vs Commonwealth, 89 Kent 274

The Court held in Mounts vs Commonwealth 98 Kentucky 274:

"A plea of guilty is inevitably followed by conviction of the offense charged in the indictment; that the only question left open in such case is the nature and extent of punishment which is still within the legal discretion of the jury. Nevertheless, if the court or attorney for the commonwealth induces a defendant in a criminal prosecution to enter a plea of guilty and he is thereby over-reached or deceived, even in respect to the extent of the punishment, permission should be given to him to withdraw the plea and substitute a plea of not guilty, a new trial being granted for that purpose."

The petitioner's plea of guilty was entered only because of the action and conduct of petitioner's counsel and the district attorney. As such he was denied the right to a trial on the merits.

People vs Walker, 260 Ill 427
Griffin vs State, 12 Ga App 615

" The law is not composed of a series of snares and pitfalls for the unwary, neithrdoes it favor what Judge Bliss terms "snap judgments".

"Courts have always been accustomed to exercise a great degree of care in receiving pleas of guilty in prosecutions for felonies, to see that the prisoner has not made his plea by being misled, or misunderstanding or the like." State vs Stephens 71 Missouri 535 also State vs Kaing 71 Missouri 551.

Petitioner's plea of guilty was a nullity and void. The motion made was not merely to withdraw the plea of guilty and to reinstate the plea of not guilty; it was a motion to vacate the judgment of conviction which should have been set aside for irregularity and fraud. The conduct of the district attorney and petitioner's counsel effected a fraud on the Court.

While a State is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness, in doing so, however, a State may not offend "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Snyder vs Massachusetts, 291 US 97, 54 Sup Ct Rep 313.

While Section 337 of the Code of Criminal Procedure regulates in general terms the procedure as to withdrawal of a guilty plea, in this instance justice has been gravely offended.

In the case of People vs Clavey 355 Illinois 358, it was said;

"The State is sovereign, and it neither needs, nor can it accept, the benefit of any questionable or undue advantage over one of its citizens. Its procedure against an accused must be kept on such an ethical plane as will be consistent with its dignity and its power. When it appears that surprise or influence has caused an accused to plead guilty when he, in fact, has any defense at all, it is a fur-

IV.

The Court of Appeals of the State of New York has decided the Federal questions herein involved in a manner directly in conflict with the decisions of the Supreme Court of the United States.

Wherefore your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the County Court of the County of Rockland and to the Court of Appeals of the State of New York commanding the said courts to certify and to send to this Court for its review and determination on a day certain to be therein named, full and complete transcripts of the records and all proceedings in the case entitled People of the State of New York against Horace Lee Bartindale, defendant, and that the said judgment of the Court of Appeals of the State of New York and the County Court may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just and your petitioner will ever pray.

Date:

Horace Lee Bartindale

by_____

Attorney for Petitioner

ficient reason to permit him to withdraw the plea of guilty and substitute one of not guilty."

A substantial right of the petitioner was violated; he was deprived of a trial on the merits.

In the case of State vs McAllister 96 Montana 348, the court held:

"A change of plea will ordinarily be permitted if it fairly appears that the defendant was in ignorance of his rights and of the consequences of his act, or if influenced unduly and improperly either by hope or by fear in making it, or if it appears that the plea was entered under some mistake or misapprehension..."

"When application is made to change the plea, all doubts should be resolved in favor of a trial on the merits, and the discretion of the court should be liberally exercised in favor of life and liberty..."

The law should seek no unfair advantage over an accused but, on the contrary, should be watchful to see that the proceedings in which his life or liberty is at stake are fairly and impartially conducted.

Point Two

The Effect of The Acts and Conduct of The District Attorney was a Flagrant Denial of Petitioner's Right To Counsel and Hence A Denial of His Rights Under The Fourteenth Amend ent To The Constitution of The United States.

A hearing includes the right to the aid of counsel, when desired and provided by the party asserting the right; it comprehends generally the right to be heard by counsel and entitles him to the guiding hand of counsel at every step.

Powell vs Alabama, 287 US 45, 68-69
Cooke vs United States, 267 US 517, 537
Pelts vs Murphy, 201 US 123, 129
Kelly vs Oregon, 273 US 589, 591

The right to counsel in every stage of a criminal proceeding necessarily connotes the right to appear and defend with counsel, uninfluenced by false and untrue representations.

Can it be said that the petitioner had the aid and assistance of

counsel throughout the proceedings when counsel was misled by the actions of the district attorney? That the promises and representations influenced counsel for the petitioner to such an extent that on the basis of such representations so communicated to petitioner, he changed his plea from not guilty to guilty.

The court held in the case of Johnston vs Commonwealth 276 Kentucky 615:

"Many men may have escaped punishment altogether, others may have unduly delayed its imposition. But neither of those considerations nor both of them can ever warrant the forfeiture of life or liberty of a man, however shocking his crime without a trial and conviction in conformity with the law. It is an inviolate right of free men to have the assistance of counsel when being prosecuted for the commission of a crime (citing constitution). This constitutional guaranty of the right of counsel imports the right to counsel prepared. To compel a defendant to go into trial without reasonable opportunity to prepare his defense is not technical. It goes to the very foundation of justice (Powell vs Alabama 287 US 45)."

In the case of State vs Keller 57 North Dakota 645, it was held that a defendant in a criminal cause is ordinarily bound by a course of action that is followed with respect to his defense by counsel employed by him. But where he is ignorant of his rights and unacquainted with the course of procedure in criminal trials and during the trial his counsel is so incapacitated as not to comprehend what is taking place, and the defendant's rights are not safeguarded so that in effect he is not represented by counsel at all, the rule does not apply, not having had a trial to which he was entitled under the Constitution and he is entitled to a new trial.

Also in the case of People vs Hitti 312 Illinois 73, the court held:

"It is intended that only persons qualified by learning, intelligence and good moral character shall be permitted to defend in a court of justice the life or liberty of a person charged with crime.

The fact that the accused is poorly defended will not justify the reversal of a judgment where it is reasonably supported by satisfactory evidence...but it is proper to take such facts into consideration, in a case of this character, in determining whether the accused has been legally convicted. At the time the attorney appeared for these defendants he held a license from the court which certified to the public that he was competent to properly represent any client who might employ him, and any person employing him had a right to rely upon that certificate. The fact that the defendants were ignorant, illiterate foreigners, unacquainted with court procedure in this or any other country and unable to speak and understand the English language requires that we take into consideration the gross incompetency and stupidity of counsel appearing for them."

Similarly the petitioner, never having been arrested or convicted of any crime heretofore was utterly unaccustomed to court procedure. He relied upon his counsel in every step of the proceedings. Whether in fact the district attorney made the representations and promises to counsel or counsel made them to petitioner in an effort that he change his plea, the conclusion remains that petitioner was actually misled and deceived thereby.

However guilty a defendant upon due inquiry might prove to have been, he was, until convicted, presumed to be innocent. The wrong committed by the State through its officers strikes at the foundation of the administration of the criminal law. To condone such conduct is to deprive a defendant in a criminal proceeding of the very rights which are guaranteed him under our Constitution.

Point Three

The Action of The County Court In Summarily Disposing Of Petitioner's Contentions as To The Circumstances Concerning His Plea of Guilty Without Affording Him The Right To Prove Them In Open Court Was In Effect A Denial Of The Right To Be Heard in Contravention Of The Fourteenth Amendment To The Constitution of The United States.

The question of due process "must be dealt with in a large way,

as questions of due process always are, not narrowly or pedantically in slavery to forms or phrases", Burnet vs Wells, 289 US 670,53Sup Ct Rep 761. It is easier to define what is not than what is due process of law within the meaning of the Fourteenth Amendment. In Davidson vs New Orleans, 96 US 97, this Court said that "The application of such an important phrase in the Federal Constitution" must be developed by the gradual process of judicial inclusion or exclusion, as the case presented for decision shall require, with the reasoning on which subject decisions may be founded.

This Court has long since established that one of the absolute essentials of due process of law as provided by the Fourteenth Amendment, is the right to be heard. Fundamental rights of a defendant shall not be taken away from him arbitrarily or without the right to be heard according to the usual course of law in such cases. The notice and hearing must correspond to and the relief granted must be appropriate to that which has been heard and determined on such notice.

Frank vs Mangum 277 US 309, 334
Garland vs Washington 232 US 642
Standard Oil vs Wo. (Hadley) 224 US 270, 281

Likewise to condemn without a hearing is repugnant to the due process clause in our constitution.

Riverside & Dan River Cotton
Mills vs Menefee 237 US 189, 193

Petitioner was denied the right to be heard. His application to set aside the judgment of conviction, to withdraw the plea of guilty and for a new trial was based upon the allegations in his moving affidavit. The papers in opposition to such motion in substance denied the allegations of the moving papers. Such answering affidavits created an issue - a grave issue involving the liberty of the petitioner. Every citizen is entitled, as a matter of right, to be heard on any issue, concerning and involving his personal liberty.

Counsel for petitioner requested that an opportunity be granted him to produce petitioner so that the court may hear testimony as to the grave charges in the moving application. This request was denied. The Court then proceeded to hear oral argument of the motion by both

counsel. And directly from the bench the court denied the petitioner's motion without any reflection or consideration of the merits or truth of the allegations in the application. (R p 24)

Clearly, with the issue so grave, involving petitioner's personal liberty (he having been sentenced to imprisonment for a term of from five to ten years) he was entitled to be heard; his application to move consideration . Clearly the truth of the allegations and denials should not have been determined by a casual perusal of the affidavits.

The court, in the interest of justice should have afforded petitioner an opportunity to prove what was alleged in the moving papers. What transpired was a "solemn farce". Brown vs Mississippi 297 US 278, 283, 56 Sup Ct R 461, 463.

The record demonstrates that the County Court gave no proper consideration to the motion and failed to approach the consideration of the issues raised by this motion "with an eye single to doing justice between the People of the State upon one side and the defendant at the bar on the other." People vs Shilitano 218 NY 175.

Conclusion

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that it may review the final judgment of the Court of last resort of the State of New York, the Court of Appeals, and correct the errors therein made and protect the petitioner in his rights, privileges and immunities granted to him by the Constitution of the United States, and that to such an end a writ of certiorari shall be granted and this Court should review the decision of the said Court of Appeals of the State of New York and finally reverse it.

Respectfully submitted,

Horace L Pettibone

Petitioner In Person